Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of	)	
	)	
Implementation of Sections of the	)	
Cable Television Consumer Protection	)	MM Docket No. 92-266
and Competition Act of 1992:	)	
	)	
Leased Commercial Access	)	CS Docket No. 96-60

REPLY COMMENTS OF THE FAITH & VALUES CHANNEL

The Faith & Values Channel L.L.C. ("Faith & Values") submits these reply comments to address issues of critical concern to programmers. The comments in this proceeding confirm that the Commission's leased access proposals would place programmers such as Faith & Values at an unfair and potentially insurmountable competitive disadvantage with subsidized leased access programmers. Contrary to the Commission's stated expectation, its present leased access proposals are likely to decrease programming diversity and harm cable operators, programmers and subscribers.

I. The Commission's Valuation Formula Is Fundamentally Unsound And Clearly Subsidizes Leased Access Programmers.

As Faith & Values concluded in its initial comments at 2-3, the Commission's proposed methodology for valuing leased access channels yields a negligible rate so that cable operators, other programmers, and subscribers effectively subsidize leased access providers. Cable operators and industry experts have introduced empirical data confirming such subsidization. For example, of the 47 programming services potentially designated for deletion by Tele-Communications, Inc. ("TCI") to accommodate leased access, 38 (81 percent) "had a negative net opportunity cost under the Commission's formula." TCI Comments at 15. If the Commission's formula were well founded, these results would suggest that TCI should immediately delete all 38 programming services.

Because Faith & Values was identified for potential deletion in TCI's Washington, D.C. and Chicago systems, which have hundreds of thousands of subscribers, it has considered the TCI data carefully and believes that they confirm the importance of including a programming service's impact on subscriber demand in any valuation of leased access channels. The data for TCI's Washington, D.C. system provide a compelling example of the fundamental shortcomings in the Commission's proposal. Under the Commission's methodology, the nine channels identified for potential deletion yielded a leased access charge of negative $.0816 -- "free" leased access for the lessees of nine channels. See "Leased Access Analysis," annexed as Attachment E to TCI Comments, at 1. Clearly, that result is contrary to logic and sound business practice, and TCI's accompanying subscriber survey data explain why.

In its Washington, D.C. system, TCI identified nine channels, including Faith & Values, for potential deletion to accommodate leased access channels. Notwithstanding the negative valuation assigned by the Commission's methodology, a survey of 302 subscribers in that system confirmed the substantial value of those channels in generating and maintaining subscribership. See "Leased Access Programming Issues Survey, " annexed as Attachment G to TCI Comments, at 5-6. For example, 81 percent of the subscribers responded that they would be "very angry" or "pretty angry" if the nine services were deleted for home shopping and infomercial leased access channels; 81 percent would view the change as "substantially" or "very substantially" lowering the value of their cable service; 32 percent would definitely cancel their service, with an additional 24 percent "probably" doing so; and, if an alternative multichannel video programming distributor were available, 39 percent would "definitely" switch to that alternative, with an additional 39 percent "probably" switching. Stronger and more direct indicia of value are difficult to imagine.

Faith & Values' strategy of offering value through a viewing alternative comprised of religious and family-oriented programming is consistent with the basic programming philosophy and goal of cable operators to provide a balanced menu of entertainment choices:

> [C]able operators have a very strong incentive to offer programming that customers are likely to want to watch. If a program will appeal to a large enough group of customers -- even if only a niche -- the cable operator will want to include it in the channel line-up. Where capacity is constrained and several cable programs are available for any channel that does open up, cable operators will want to add the programming that is most likely to bring in new customers or help retain existing customers.

Affidavit of Robert A. Stengel ("Stengel Aff."), annexed as Attachment 1 to Comments of Continental Cablevision, Inc. ("Continental"), at ¶12. As viewer demand for "popular" programming is satisfied, "niche programming services are particularly valued by customers in making purchase decisions." Affidavit of Camille Jayne, annexed as Attachment F to TCI Comments, at ¶5; see Stengel Aff. at ¶19; A. Daniel Kelley, "An Economic Analysis of Commercial Leased Access Pricing" ("Economic Analysis"), annexed to Comments of Time Warner Cable ("Time Warner"), at 9 n.17.

The religious and family-oriented programming of Faith & Values is highly valued by a significant portion of existing and potential subscribers. For example, the market research annexed as Exhibit 1 to the Comments of US West suggests that 16 percent of subscribers identified "religious programming" as "influential" in their decision to subscribe to cable or to continue their subscriptions, with 34 percent identifying "family shows" as "influential." Even "relatively small actual or potential audiences" have communicated their desire for religious programming to cable operators. See Stengel Aff. at ¶18. To ignore the impact of programming services upon subscriber demand, even if that impact is difficult to quantify,[1] will yield the kind of unrealistic leased access valuations consistently calculated under the Commission's proposed methodology.

By limiting its valuation formula to only the specific channels to be deleted, the Commission's methodology further understates the value of leased access channels. Consistent with Faith & Values' expectations (Comments at 3), cable operators are likely to delete recently-launched channels: "Where new capacity is not available, the only sensible choice would be to displace the most recently launched, least penetrated channels." Stengel Aff. at ¶42. However, because such channels have not had sufficient carriage and promotion to expand their viewership, they are likely to generate the least per-channel revenue under the Commission's formula. In short, a "new channel will only prove its value over the long term." Id. at ¶28. Clearly, if channels are designated for potential deletion, they will not achieve their full revenue-generating potential.

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[1] Several commenters presented empirical data demonstrating that modest subscriber losses would cause cable operators to lose revenues far exceeding the typical "highest implicit fee" paid under the Commission's existing rules. For example, a 1 percent decline in subscribership yields a monthly revenue loss of approximately $.21 per subscriber on the average Continental system. Continental Comments at 11. Similarly, a 10 percent loss of business in Time Warner's Tampa Bay system would result in a loss of "approximately 50 cents per leased access channel per subscriber." "Economic Analysis" at 20.

II. Subsidized Leased Access Will Decrease Diversity To The Detriment Of Viewers And Programmers.

Leased access does not provide a suitable carriage vehicle for programming services such as Faith & Values, which depend on not only advertising, but also subscription revenues. Instead, the comments establish that leased access is well suited to programmers which sell or advertise products and incur low programming costs:

> Only a narrow subset of programming services, those relying solely on product and advertising sales, can survive economically on a leased access channel on a service tier. The race among new and existing home shopping networks and suppliers of infomercials for carriage on tiers may quickly fill the available leased access channels.

Stanley M. Besen & E. Jane Murdoch, "The Impact of the FCC's Leased Access Proposal on Cable Television Program Services" ("Impact of FCC's Leased Access Proposal"), annexed to Joint Comments of Turner Broadcasting System, Inc., News Corporation, Ltd., and C-SPAN, at 17; Mark A. Riely, "Industry Report: Commercial Leased Access to Change Cable Landscape," annexed as Attachment A to Comments of ValueVision International, Inc. ("ValueVision"), at 1 ("[w]e expect significant activity from home shopping/infomercial providers"). The experience of cable operators confirms that leased access is best suited to various forms of advertising: "The data show that many of the limited number of inquiries come primarily from home shopping and infomercial operators." "Economic Analysis" at 8; see Stengel Aff. at ¶15 ("the most frequent types of programming for which access is sought are shopping channels, real estate 'showcases,' and 'infomercials'").

To the extent that other types of programmers support the Commission's leased access proposal, virtually all of them seek some type of regulatory preference or set-aside. Thus, low power television operators seek an absolute rate of $.03 per subscriber or less or some other form of preference. See Comments of the Community Broadcasters Association at 3, 10-11.

Non-profit organizations seek a special set-aside and preferred rate. See Comments of Center for Media Education, Alliance for Community Media, Association of Independent Video and Filmmakers, Consumer Federation of America, National Association of Artists' Organizations, United States Catholic Conference at 15-21. The Game Show Network, L.P. seeks a limitation on the leased access capacity available to categories of programming, such as infomercials. See Game Show Network Comments at 11-13. They do so because home shopping/infomercial programming is best suited for leased access.

In contrast the comments establish a vibrant and increasingly diverse programming marketplace under the Commission's present leased access rules. Numerous affiliated[2] and unaffiliated programmers have announced over 100 prospective launches. Notwithstanding the shortage of channel capacity, in 1994, "[o]verall, the number of programming networks increased by over 26.7%, from 108 to 128." Second Annual Report, CS Docket No. 95-61, FCC 95-491 (rel. Dec. 11, 1995), at ¶19; see Comments of Outdoor Life Network, Speedvision Network, The Golf Channel, and BET on Jazz ("Outdoor Life, et al.") at 16-17; TCI Comments at 7.

Because of the existing shortage of channel capacity, an increase in demand for leased access caused by a regulatory subsidy will require the deletion of numerous programming services in cable systems throughout the country. Faith & Values need look no further than TCI's comments to identify over a half million potentially lost subscribers resulting from subsidized leased access. Faith & Values respectfully submits that replacing programming

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[2] Faith & Values objects to ValueVision's attempt to have the Commission broadly define "Affiliate" for purposes of Section 532(b). ValueVision Comments at 9-12. ValueVision's proposal is contrary to the plain language of 47 U.S.C. §522 defining "Affiliate" for purposes of Title VI. In any event, this issue is outside the scope of the Commission's Further Notice of Proposed Rulemaking.

services such as Faith & Values with a third or fourth home shopping service or infomercial channel through a regulatory subsidy is not in the public interest and does not increase diversity. Although Section 532(a) charges the Commission with adopting regulations which "promote competition" among programming services, the Commission's present proposal does just the opposite.[3]

Mandatory carriage of leased access channels on basic or widely-distributed cable programming service tiers ("CPSTs") would only exacerbate the competitive imbalance between leased access channels and other programming services. In addition to gaining carriage, an essential element in carriage negotiations is the tier and even placement on that tier among complementary channels. Such tiering and packaging creates value to programming services as a result of the "spillover of audiences among programming services." "Impact of FCC's Leased Access Proposal" at 6. With mandated carriage on basic or the most widely-distributed CPSTs, leased access services, over which a cable operator has no editorial control, will be able to "free-ride" on the quality of existing programming services. Id. at 6-7. Thus, even those programming services which are not deleted are nonetheless harmed by subsidized leased access because of a decrease in the "positive spillovers" among programming services on a tier or in a cluster. Id. at 17-20. Finally, there are practical limits to the number of channels on a tier -- mandated carriage of leased access channels necessarily limits the carriage opportunities for other programmers.

[3] As a number of other programmers have recognized in their comments, the Commission's current proposal raises serious issues under the First and Fifth Amendments to the Constitution. Outdoor Life, et al. Comments at 28-30; Comments of Cable Programming Coalition of A&E Television Networks, The Courtroom Television Network, NBC Cable and Ovation ("Coalition") at 40-53.

III. The Commission Should Adopt Transitional Rules To Mitigate The Disruption And Harm Caused By Substantial Changes In Leased Access.

The record in this proceeding conclusively demonstrates that the Commission's leased access valuation and carriage proposals are fundamentally flawed and should be abandoned. Nonetheless, if the Commission otherwise substantially revises its leased access rules, Faith & Values respectfully submits that it should adopt appropriate transitional rules to minimize the adverse impact of such revisions on cable operators, programmers, and subscribers.

Cable operators and programmers, including Faith & Values, have identified the following transitional rules which will mitigate the disruption potentially caused by artificially-created leased access demand:

- The Commission should adopt a multi-year transition period to phase in such expanded leased access. Alternatively, programmers have suggested that the Commission grandfather the carriage of existing services, adopt separate pricing methodologies for vacant and occupied channels, and implement a transition based on increases in channel capacity. *Comments of ESPN, Inc. at 7; Comments of Lifetime Television at 7; Coalition Comments at 58; Outdoor Life, et al. Comments at 37-38.*

- The Commission should not require the deletion of full-time programming services in order to accommodate part-time leased access requests. Clearly, such deletion would disserve the public interest in programming diversity. *Coalition Comments at 59-60; Outdoor Life, et al. Comments at 30-33; Comments of Cox Communications, Inc. at 24-26.*

- If the Commission does not limit its valuation of leased access to the specific channels to be deleted, as suggested by Faith & Values, the designation of channels to be deleted would serve no purpose. *See Coalition Comments at 57-58 (a "hit list" of programming to be deleted "would create undue alarm with viewers, third party programmers, investors and advertisers, causing a decrease in revenue and support").* At the very least, the Commission should grant cable operators flexibility in revising any required deletion designations to reflect changed circumstances and to permit programmers to negotiate for continued carriage.

Such transitional rules plainly do not solve the problems created by subsidized leased access; they merely limit the resulting damage. The only meaningful solution is for the Commission to withdraw and reconsider its proposed valuation formula and carriage mandate so that programmers such as Faith & Values will have a fair opportunity to compete with leased access providers.

Conclusion

The Commission's proposed valuation methodology clearly does not yield a realistic valuation of leased access channels. Notwithstanding the Commission's disclaimer of any intention to lower leased access rates, its proposed formula does just that -- providing "free" leased access for virtually all channel set-asides. Such valuation simply does not square with reasonable expectations or the documented record in this proceeding. Mandatory carriage of leased access channels on the most desired tiers further increases the inequities which would result from the Commission's proposal. Faith & Values does not ask for any preference, but it does seek a fair opportunity to compete for carriage. Faith & Values respectfully submits that the Commission's present leased access proposal simply does not present that opportunity.

Respectfully submitted,

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